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September 15, 2008

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**VIA HAND DELIVERY**

Thomasenia P. Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: MUR 6059 (Club for Growth PAC)**

Dear Ms. Duncan:

This office represents Club for Growth PAC ("Club PAC") and Pat Toomey as Treasurer of Club PAC (together referred to as "Respondents"). On their behalf, we hereby respond to the complaint ("Complaint") the Federal Election Commission ("FEC" or "Commission") has designated Matter Under Review ("MUR") 6059. Please find at Tab A faxed copies of executed Designation of Counsel forms for Club for Growth PAC and Patrick Toomey, Treasurer of Club for Growth PAC.<sup>1</sup>

The Complaint, with no supporting evidence, alleges coordination between Club PAC and the campaign of Sean Parnell in the 2008 Republican Primary in the At-Large Congressional District of Alaska. Specifically, the Complaint alleges that Club PAC coordinated with the Parnell campaign television ads that Club PAC aired in Alaska beginning on August 19, 2008.

This allegation has no basis in fact or in the law. Club PAC acted independently at all times with respect to its communications in Alaska. Accordingly, the Commission should find no reason to believe that Respondents violated the Federal Election Campaign Act, as amended, ("the Act") and dismiss the Complaint.

**THE COMPLAINT**

Barbara Mee and Alaskans for Don Young filed the Complaint on August 25, 2008. The Complaint makes two unsubstantiated claims. First, the Complaint alleges that a certain Club PAC television ad constituted an improper electioneering communication. Second, the Complaint alleges that Club PAC made excessive contributions to the Parnell campaign because it allegedly coordinated with the Parnell campaign television advertisements aired by Club PAC on August 19, 2008,

<sup>1</sup> We will follow up with the original Designation of Counsel forms under a separate cover.

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and dates following. The Complaint bases this second accusation entirely on a press report stating that Mr. Parnell met with the Club for Growth, which later endorsed Mr. Parnell. The Complaint otherwise is devoid of any facts or even allegations as to how the PAC advertisements were coordinated with the Parnell campaign.

Instead, the Complaint posits the following baseless assertion, highlighting its own lack of information and the absence of any coordination:

This Club for Growth ad appears to be coordinated as that term is defined in 11 CFR 109.21. It is paid for by a person other than an authorized committee. It is an electioneering communication as described above. Mr. Parnell has admitted in these press stories that he has met with Club for Growth staff and discussed with them the Alaska Congressional race. It can be assumed that he has discussed his campaign plans, projects, activities and needs, position on issues, poll results and other information concerning his campaign.

2<sup>nd</sup> page of unnumbered Complaint (emphasis added).

Taking coordination as given, the Complaint alleges that Club PAC made excessive contributions to the Parnell campaign by virtue of the purportedly coordinated ads.

### THE FACTS

On August 19, 2008, Club PAC began to broadcast a television advertisement and a radio advertisement in Alaska. These were independent expenditures for the At-Large Congressional District of Alaska and reported as such. The ads carried the proper disclaimers to identify them as independent expenditures. According to the sworn testimony of the Executive Director of the Club for Growth, the connected organization of Club PAC, Club PAC produced and disseminated ads in Alaska completely independently of candidates, campaign committees, party committees, and their agents. Affidavit of David Keating ¶ 5, dated September 15, 2008 [hereinafter "Keating Aff."], attached hereto at Tab B. The absence of coordination encompasses all aspects of the advertisements, including the timing and content of the ads. *Id.* ¶¶ 5-15. It is the policy and practice of Club PAC not to coordinate its ads with any candidate, political party, or their agents. *Id.* ¶ 8.

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No person associated with the 2008 Club PAC ads in Alaska had any conversations with Sean Parnell, one of the candidates mentioned in the ads, his campaign, any political party committee or any of their agents, in which Club PAC learned material information about the campaign's plans, projects, activities, or needs or conveyed the possibility that Club PAC might run independent advertisements or the particulars of any Club PAC advertisement such as the timing or content. *Id.* ¶¶ 6, 8. While Mr. Parnell and personnel from the Club for Growth did meet on May 29, 2008, and had several related telephone conversations between April and early June 2008, these discussions were not for the purpose of coordination and did not involve any coordination. *Id.* ¶ 6. The subject of these conversations was Mr. Parnell's views on legislative and policy issues. *Id.*

Club PAC did not involve Mr. Parnell, his campaign, any political party committee, or any of their agents, in the creation, content, or dissemination of the 2008 Club PAC ads in Alaska. *Id.* ¶ 10. Club PAC, acting independently, did not

- Create or disseminate any communications in Alaska at the suggestion or request of the Parnell campaign, a political party committee, or any of their agents; or
- Seek or receive assent from the Parnell campaign, a political party committee, or any of their agents as to any communication in Alaska.

*Id.* ¶ 9. Moreover, Club PAC did not discuss with, or transfer any information from or to, the Parnell campaign, any political party committee, or any of their agents regarding

- Any aspect of Club PAC communications; or
- Club PAC's plans, projects, activities, or needs.

*Id.* ¶¶ 8, 12. Further, Club PAC did not receive any material information from the Parnell campaign, its agents, or any political party committee about the campaign's plans, projects, activities, or needs. *Id.* ¶ 11.

Additionally, Club PAC did not employ any former employee or independent contractor of the Parnell campaign, the Young campaign, or any political party committee. *Id.* ¶ 13. Finally, Club PAC did not retain for purposes of communication strategy, production, or media buys in the 2008 Alaska Republican Primary any vendor common to the Parnell campaign. *Id.* ¶ 14. Warfield &

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Company and Patrick Media performed these functions for Club PAC in Alaska. *Id.* These vendors did not work for the Parnell campaign. *Id.* Club PAC has a long-standing practice of ensuring that vendors working on its ads do not also work for the campaigns of any candidates mentioned or featured in such ads, a political party, or agents of either. *Id.*

### THE LAW

The Complaint first alleges that Club PAC made improper electioneering communications. Electioneering communications, however, are not in the PAC lexicon. According to the Commission's regulations PACs do not make electioneering communications because there is an exemption from the definition of "electioneering communication" for communications that "[c]onstitute expenditures or independent expenditures provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations." 11 C.F.R. § 100.29(c)(3).

The Complaint's coordination allegation derives from the issue of whether certain communications were "coordinated communications." "A payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution under 11 CFR 100.52(d) to the candidate . . . ." 11 C.F.R. § 109.21(b)(1).

Pursuant to section 109.20 of the FEC's regulations, "coordinated" means "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee or an agent of any of these entities." Further, for a communication to be coordinated, it must satisfy both the content and conduct standards set forth in the federal regulations. *Id.* § 109.21(a).

The content standards are not at issue in this MUR. On the other hand, the conduct standard is at issue and requires that certain types of conduct have taken place. The full text of the conduct standard is found at Tab C. Briefly, coordinated communications result from conduct such as making or disseminating covered content

- At the request or suggestion of the campaign or its agents;
- With the material involvement of the campaign or its agents;

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- After substantial discussions with the campaign or its agents;
- Using a common vendor; or
- Using a former employee or independent contractor.

*Id.* § 109.21(d). A substantial discussions is one where "information about the candidate's . . . campaign plans, projects, activities, or needs is conveyed to a person paying for the communication and that information is material to the creation, productions, or distribution of the communication." *Id.* § 109.21(d)(3).

Finally, there exists a safe harbor "for responses to inquiries about legislative or policy issues." *Id.* § 109.21(f). Specifically,

A candidate's . . . response to an inquiry about that candidate's . . . positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities, or needs, does not satisfy any of the conduct standards in paragraph (d) of this section.

*Id.*

## DISCUSSION

As can be seen below, Club PAC did not make an improper electioneering communication and did not coordinate its television ads in Alaska with the Parnell campaign or otherwise.

### 1. Club PAC Did Not Make Improper Electioneering Communications

The Complaint spends much of its time asserting that the communications were "improper electioneering communication[s] under 11 CFR 100.29." 1<sup>st</sup> page of unnumbered Complaint. The Complaint, however, never states why the ads were themselves improper communications other than the coordination allegations.

In any event, the complainant is apparently uninformed as to FEC regulations, for PACs cannot make advertisements deemed to be electioneering communications. Club PAC reported the ads as independent expenditures, Keating Aff. ¶ 4, and, as a result, the ads do not constitute "electioneering communications." Per FEC regulations, PACs do not make electioneering communications. Instead, PACs

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make expenditures or, in this case, independent expenditures, which are exempt from the definition of "electioneering communication." 11 C.F.R. § 100.29(c)(3). Accordingly, this allegation in the Complaint is a non sequitur.

## **2. Club PAC Did Not Coordinate Its Alaska Television Ad**

In addition, the allegation contained in the Complaint about Alaska coordination is unfounded. As attested to by the Executive Director of Club for Growth, who has direct and personal knowledge of the activities that transpired, Club PAC did not engage in any activities that constituted coordination, through the timing or content of the television ads or otherwise. For there to be a coordinated communication under the FEC's regulations, both the content and conduct factors must be fulfilled. *Id.* § 109.21(a). As can be seen below, Club PAC, consistent with its practice and policy, *see* Keating Aff. ¶¶ 5-15, did not transgress any of the coordination conduct factors and thus did not make an impermissible coordinated communication. Without the conduct proscribed in 11 C.F.R. § 109.21(d), there can be no finding of coordination.

Club PAC did not run any communications in Alaska at the request or suggestion of the Parnell campaign, any political party committee, or any of their agents. Keating Aff. ¶ 9. Club PAC also did not seek or receive assent from the Parnell campaign, any political party committee, or any of their agents for its ads. *Id.* Thus, 11 C.F.R. § 109.21(d)(1) was not violated.

The Parnell campaign, a political party committee, and any of their agents were not involved in the development, creation, content, dissemination, or any other aspect of Club PAC's communications in Alaska. Keating Aff. ¶ 10. *See* 11 C.F.R. § 109.21(d)(2). Club PAC personnel had no discussions with the Parnell campaign, any political party committee, or any of their agents about any aspect of Club PAC's Alaska communications. Keating Aff. ¶ 11. There were no discussions between Club PAC and their agents and the Parnell campaign, any political party committee, or any of their agents with respect to Alaska communications or Club PAC's plans, projects, activities, or needs. *Id.* ¶¶ 11-12.

Club PAC also did not receive any material information from the Parnell campaign, any political party committee, or any of their agents about the campaign's plans, projects, activities, or needs. *Id.* ¶¶ 6-7, 11. Contrary to the unsubstantiated allegations in the Complaint, the discussion described in the press article attached to the Complaint entitled "Parnell cultivates support from right" was a meeting on

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May 29, 2008, between Parnell and Club personnel with respect to legislative and policy issues. *Id.* ¶ 6. At no time during that meeting or in related phone calls did Parnell or the Club personnel exchange any information about any aspect of Club PAC's Alaska communications (or the possibility of such communications) or the Parnell campaign's plans, projects, activities, or needs. *Id.* Therefore, 11 C.F.R. § 109.21(d)(3) was not violated.

Moreover, because these discussions were about Mr. Parnell's positions on legislative and policy issues, the discussions fall within the safe harbor at 11 C.F.R. § 109.21(f). This safe harbor pertains to a "candidate's . . . response to an inquiry about that candidate's . . . positions on legislative or policy issues." *Id.*

The allegations in the Complaint and information in the articles attached to the Complaint do not contravene this testimony, for the Complaint simply "assumes" an improper exchange of campaign information and provides no other facts to support its assertions. *See* 2<sup>nd</sup> page of unnumbered Complaint. The Complaint could not put forward any such evidence because, as shown by Mr. Keating's testimony, there was no improper exchange of campaign information.

Moreover, there was no common vendor, and Club PAC did not violate the coordination conduct provision contained in 11 C.F.R. § 109.21(d)(4). This accords with the practice that Club PAC has employed with its vendors to ensure that they are not common to candidates featured or mentioned in its ads. Keating Aff. ¶ 14. Warfield & Company and Patrick Media were the vendors that Club PAC used for political strategy, ad production, and media buys in Alaska. *Id.* These two vendors did not also work for the Parnell campaign, the Young campaign, or a political party committee. *Id.*

Further, Club PAC did not employ a former staffer or independent contractor of the Parnell campaign, the Young campaign, or a political party committee. *Id.* ¶ 13. Thus, the conduct standard for coordination found in 11 C.F.R. § 109.21(d)(5) was not met.

Finally, the mere fact that Club PAC raised from its members earmarked contributions for the Parnell campaign does not show any coordination. Club PAC independently undertook, and reported the costs of, the solicitation and transfer of earmarked contributions from members of the Club to the Parnell campaign. Keating Aff. ¶ 15. The reports cited in the Complaint show no aspect of

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coordination – just that Club PAC and Club members supported Parnell. If there were any communications with the campaign about problems with the delivery of earmarked member contributions, per Club PAC policy and practice, only the Club's Director of Operations or his assistants would have undertaken such communications and, in such an event, any such communications would have been limited to the problems with the contribution delivery. *Id.* Club PAC followed this policy with respect to the independent earmarked member contributions sent to Mr. Parnell. *Id.*

In sum, in general and as to particular circumstances alleged in the Complaint, no coordination took place in Alaska between Club PAC and the Parnell campaign. The Complaint is in error both legally and factually and should be dismissed.

#### CONCLUSION

As the un-rebutted testimony above makes clear, Club PAC did not coordinate with the Parnell campaign regarding the content, timing, or any other aspect of its independent expenditures in Alaska. Since the advertisements were independent expenditures, Club PAC did not make excessive contributions to the Parnell campaign or make improper electioneering communications. As a result, the Commission should find that there is no reason to believe that Respondent violated the Act and, hence, dismiss the entire Complaint.

Sincerely,

Carol A. Laham  
D. Mark Renaud

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**STATEMENT OF DESIGNATION OF COUNSEL**  
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The above-named individual and/or firm is hereby designated as my  
counsel and is authorized to receive any notifications and other communications  
from the Commission and to act on my behalf before the Commission.

9/13/02  
Date

[Signature]  
Respondent/Client Signature

Reasoner  
Title

RESPONDENT/CLIENT Club for Growth PAC  
(Please Print)

MAILING Club for Growth  
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TELEPHONE- HOME ( 202 ) 955-5500 (office)

BUSINESS ( ) \_\_\_\_\_

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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counsel and is authorized to receive any notifications and other communications  
from the Commission and to act on my behalf before the Commission.

9/13/02  
Date

[Signature]  
Respondent/Client Signature

\_\_\_\_\_  
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(Please Print)

Club for Growth

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BUSINESS (        ) \_\_\_\_\_

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**TAB C**

The conduct standard of the Federal Election Commission's coordination regulations requires that one of the following types of conduct be present.

**(1) *Request or suggestion.***

**(i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or**

**(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.**

**(2) *Material involvement.* This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. A candidate, authorized committee, or political party committee is materially involved in decisions regarding:**

**(i) The content of the communication;**

**(ii) The intended audience for the communication;**

**(iii) The means or mode of the communication;**

**(iv) The specific media outlet used for the communication;**

**(v) The timing or frequency of the communication; or**

**(vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.**

**(3) *Substantial discussion.* This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's**

authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

(4) *Common vendor.* All of the following statements in paragraphs (d)(4)(i) through (d)(4)(iii) of this section are true:

(i) The person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor, as defined in 11 CFR 116.1(c), to create, produce, or distribute the communication;

(ii) That commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided any of the following services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days:

(A) Development of media strategy, including the selection or purchasing of advertising slots;

(B) Selection of audiences;

(C) Polling;

(D) Fundraising;

(E) Developing the content of a public communication;

(F) Producing a public communication;

(G) Identifying voters or developing voter lists, mailing lists, or donor lists;

(H) Selecting personnel, contractors, or subcontractors;  
or

(I) Consulting or otherwise providing political or media advice; and

(iii) This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source. That commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor.* Both of the following statements in paragraphs (d)(5)(i) and (d)(5)(ii) of this section are true:

(i) The communication is paid for by a person, or by the employer of a person, who was an employee or independent contractor of the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, during the previous 120 days; and

(ii) This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source. That former employee or independent contractor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

6) *Dissemination, distribution, or republication of campaign material.* A communication that satisfies the content standard of paragraph (c)(2) of this section or 11 CFR 109.37(a)(2)(i) shall only satisfy the conduct standards of paragraphs (d)(1) through (d)(3) of this section on the basis of conduct by the candidate, the candidate's authorized committee, or the agents of any of the foregoing, that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished. The conduct standards of paragraphs (d)(4) and (d)(5) of this section may also apply to such communications as provided in those paragraphs.

11 C.F.R. § 109.21(d).